Filed 9/21/16 P. v. Parkinson CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARTELL LANE PARKINSON, Defendant and Appellant.	A145788 (Del Norte County Super. Ct. No. CRF15-9024)

Defendant Martell Lane Parkinson appeals a six-year prison sentence imposed after he entered a guilty plea to first degree burglary. (Pen. Code, §§ 459, 460, subd. (a).)[1] He contends he was denied due process at the sentencing hearing when the prosecution submitted evidence supporting an upper six-year term without previously submitting a written statement in aggravation; that defense counsel was ineffective in failing to object to the lack of notice; and that the trial court abused its discretion in relying upon certain aggravating factors.

The sentencing hearing unquestionably was procedurally improper. Nevertheless, we must affirm the sentence because defendant forfeited his right to contest the lack of notice by failing to object, and the trial court did not abuse its discretion in sentencing defendant to the upper term. The record fails to demonstrate the elements necessary to establish defendant's contention that he received ineffective assistance of counsel, which,

[1] All further section references are to the Penal Code except as noted.

if meritorious, can be properly considered only upon a petition for a writ of habeas corpus.

Statement of Facts

A police officer testified at the preliminary hearing to the following facts. On the afternoon of January 10, 2015, Anthony Caltabiano returned home to find an unfamiliar car parked in his driveway. Caltabiano parked close behind the car, preventing it from leaving. He entered his kitchen and noticed that his motion-activated pantry closet light was illuminated. Caltabiano called out "Who is there" and defendant came out of the closet saying "I'm sorry. I'm sorry." Defendant tried to leave the house. Caltabiano, with a Taser gun held at his side, "confronted" defendant. Defendant had Caltabiano's heavy Maglite flashlight in hand and swung it at Caltabiano from a few feet away to "back him off." Caltabiano closed the front door to keep defendant from leaving and defendant again swung the flashlight. Caltabiano moved to avoid being struck in the face and, fearing injury, allowed defendant to run out of the house. Defendant did not get far. When he saw his car blocked in the driveway, he "put his arms down and handed the flashlight back over to [Caltabiano] and tried to make amends." Caltabiano called the police.

A police officer responding to the scene testified that defendant's demeanor was "[s]tartled and confused." The officer looked inside the pantry and found a bag belonging to Caltabiano that had been filled with several food items from the pantry shelves. The officer also found "a stick and a chain inside the pantry that didn't belong to [Caltabiano]." A search of defendant found keys that Caltabiano identified as "keys to unlock the tills at Walgreen's, his place of business."

Trial Court Proceedings

Defendant was charged with first degree robbery (§ 211), first degree burglary (§§ 459, 460, subd. (a)), and assault with a deadly weapon (§ 245, subd. (a)(1)). It was further alleged that the robbery and burglary offenses were violent felonies (§§ 667.5, subds. (9), (21)), and that the assault offense was a serious felony (§ 1192.7, subd. (c)(23)). Defendant entered an open plea of guilty to first degree burglary unconditioned

upon receipt of a particular sentence and knowing that the maximum allowable sentence is six years.

A probation officer filed a presentence report recommending a midterm four-year sentence. Defendant was reported to be a married man with three minor children who was recently employed as a janitor and suffers from methamphetamine addiction. Two circumstances in aggravation were noted: (1) the crime involved the threat of great bodily injury and (2) defendant's crimes were of increasing seriousness, as defendant committed this burglary four months after completing probation for drug possession. A mitigating circumstance was defendant's prior satisfactory performance on probation. The probation officer concluded that the middle term was appropriate given defendant's "minimal criminal history," a drug abuse problem that "may contribute to his criminal behaviors," and the absence of financial loss or physical injury to the victim. The probation officer also submitted to the court a letter from defendant's wife attesting to his work history and a copy of defendant's resume.

At the start of the sentencing hearing, the trial judge said "My tentative decision is to follow the probation department's recommendation of the four-year midterm in prison." "[T]he report seems to indicate that it was just, basically, a straightforward first degree burglary, neither mitigated nor aggravated."

The prosecutor argued that the probation department "missed" several aggravating factors and argued for a six-year term. His presentation included the admission in evidence, without objection, of a recording from a police body-worn camera depicting defendant's arrest, the police interview with the victim, and investigation of the burglary site. The prosecutor played the recording and pointed to a stick "with a chain wrapped around it" located in the pantry, saying defendant brought the item with him and "this is clearly something that can be used as a weapon." The prosecutor also used the recording to show that defendant was wearing a bandana and sunglasses when arrested and had latex gloves in his pocket. The prosecutor argued that "defendant had on his person medical gloves, which, I think, anybody with common sense knows are gloves worn by thieves who are not wanting to leave behind fingerprints. So he had those in his pocket.

He gave some excuse about it being work. Whatever. But he has it on his person. [¶] So that would go to the planning. The bandana and the shades, I would also submit, go to the planning." The prosecutor also played the recording of the victim demonstrating to the officer the manner in which defendant swung the flashlight. The prosecutor stated: "I presented the court with a lot of information today that wasn't in the probation report" and demonstrated that this case "is not what the court initially thought it was. It's not a straight 459 first. And if you're going to weigh the factors in aggravation and mitigation, it's clear that this is an aggravated case, and I ask you to sentence the defendant to six years."

Defense counsel argued the facts. She denied any evidence of planning, stating there was nothing unusual about a person wearing sunglasses and a bandana and that defendant had latex gloves because he works for a campground cleaning restrooms. Counsel also argued that if the gloves were brought to prevent leaving fingerprints then he would have worn them during the burglary, which he did not. She maintained there was no basis for an aggravated sentence, noting defendant's minimal criminal history and explaining the present crime as a relapse into methamphetamine use.

The court asked the probation officer if he continued to recommend the midterm sentence and he said yes. The court nonetheless imposed the aggravated term: "With regard to the circumstances is aggravation and mitigation, I think the prosecution has shown a couple things today that would indicate that aggravating factors would apply, including planning. He may have had a perfectly innocent reason for having a bandana over his head, as I know that he has longer-than-shoulder-length hair. It was wrapped up in a bandana. Sunglasses and the gloves. That would indicate that he was intending to not leave fingerprints. So there's an element of planning, which is an aggravating factor. [¶] He did use a weapon, had with him the stick with the chain on it as well as swung the . . . flashlight at the victim. [¶] And these crimes appear to be of increasing seriousness, going from simply drugs to basically going into somebody's home and burglarizing a home, a first degree burglary. [¶] So it appears to me that the appropriate sentence is the aggravated term of six years."

Discussion

1. *The prosecutor improperly offered evidence in aggravation at the sentencing hearing without prior notice of his intention to do so, but the procedural irregularity was waived by defendant's failure to object.*

When a judgment of imprisonment for a determinate term is to be imposed and the statute specifies three possible terms, the choice of the appropriate term rests within the sound discretion of the court. (§ 1170, subd. (a)(3).) The probation department conducts an investigation and prepares a presentence report stating the "circumstances surrounding the crime and the prior history and record of the person" to assist the court when making its determination. (§ 1203, subd. (b)(1); accord Cal. Rules of Court, rule 4.411.5.)

The prosecutor may submit a statement in aggravation "to dispute facts in the record or the probation officer's report, or to present additional facts." (§ 1170, subd. (b).) A statement in aggravation must be filed "at least four days before the time set for sentencing," and include a "summary of facts that the party relies on as circumstances justifying the imposition of a particular term" and "[n]otice of intention to dispute facts or offer evidence" in aggravation at the sentencing hearing. (Cal. Rules of Court, rule 4.437(a), (c)(1), (c)(2).) "The statement must generally describe the evidence to be offered, including a description of any documents and the names and expected substance of the testimony of any witnesses. No evidence in aggravation . . . may be introduced at the sentencing hearing unless it was described in the statement, or unless its admission is permitted by the sentencing judge in the interests of justice." (Cal. Rules of Court, rule 4.437(c)(2).)

The prosecutor here did not file a statement in aggravation, nor did he argue that the trial court should nonetheless permit the introduction of evidence "in the interests of justice." With no prior notice of an intention to seek an aggravated term or to introduce evidence, the court permitted the prosecutor to blindside the defendant by introducing new undisclosed and partially unsubstantiated evidence, including a police recording made at the time of arrest, to argue the existence of aggravating factors.

Defendant contends, correctly, that the prosecutor and trial court "failed to follow the proper statutory procedural framework for sentencing." However, defendant forfeited his right to raise the issue on appeal by failing to object in the trial court. An objection to the prosecutor's failure to provide notice of his intention to introduce evidence supporting an aggravated sentence would have alerted the court to the omission and allowed for correction, either by excluding the evidence or granting a continuance to permit defendant time to respond.

" ' "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial." ' [Citation.] ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ." ' [Citation.] [¶] ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." ' " (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590, italics omitted.)

"In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims, reviewing courts have required parties to raise certain issues at the time of sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 351, italics omitted.) The forfeiture or waiver doctrine has been applied "to various issues concerning the manner in which sentence is imposed and the hearing is conducted." (*Id.* at p. 352.) Thus, "a criminal defendant cannot argue for the first time on appeal" that the court "aggravated a sentence based on items contained in a probation report that were erroneous or otherwise flawed." (*Id.* at pp. 351-352.) A similar rule applies here to

prevent defendant from arguing for the first time on appeal that the court aggravated a sentence based on prosecution evidence not previously disclosed. "Legal questions relating to a lack of notice at a sentencing hearing are waived on appeal in the absence of an objection in the trial court." (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1124.)

2. The record does not necessarily establish ineffective assistance of counsel.

Defendant contends that defense counsel was ineffective in failing to object and obtain a continuance to respond to the prosecution's new evidence offered at the sentencing hearing. A criminal defendant has the right to counsel and " 'the right to counsel is the right to effective assistance of counsel.' " (*Strickland v. Washington* (1984) 466 U.S. 668, 686.) To establish ineffective assistance of counsel, a defendant "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." (*Id.* at p. 687.)

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (*Strickland v. Washington*, *supra,* 466 U.S. at p. 688.) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " (*Id.* at p. 689.) " 'In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal.' " (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

Defendant contends there can be no satisfactory explanation for counsel's failure to object and seek a continuance of the sentencing hearing to present rebuttal evidence. The record, however, fails to negate the possibility that counsel made a strategic decision not to do so — conceivably after conferring with the defendant[2] — believing that there

[2] The record reflects no break in the proceedings but it is possible that counsel spoke with defendant while the proceedings were in progress.

was no helpful rebuttal evidence to be obtained and that the best strategy was immediately to address and attempt to refute the inferences the prosecutor attempted to draw from the evidence presented. Counsel did in fact vigorously argue against the prosecutor's claim that the proffered police recording provided proof of aggravating circumstances. Neither the record nor the appellate briefs provide any indication of what contradictory or mitigating evidence the defense might have procured or otherwise accomplished by obtaining a continuance. On the record before us, therefore, we cannot conclude that counsel acted incompetently or that defendant was prejudiced by counsel's failure to object and seek a continuance. Neither can we exclude those possibilities, which can only be resolved upon a petition for a writ of habeas corpus.

3. *The trial court did not abuse its discretion in sentencing defendant to the upper term.*

In sentencing defendant to the upper term, the court found several circumstances in aggravation: weapon use, planning, and convictions of increasing seriousness. (Cal. Rules of Court, rule 4.421(a)(2), (a)(8), (b)(2).) Defendant argues that the court improperly relied upon the first two factors because "the record has a disputed factual situation regarding alleged use of the flashlight" as a weapon and defendant's possession of sunglasses and latex gloves does not provide sufficient evidence of planning.

"We review a trial court's sentencing choice for an abuse of discretion and reverse only when there is a clear showing the sentence is arbitrary or irrational." (*People v. Ogg* (2013) 219 Cal.App.4th 173, 185.) The two disputed factors are certainly questionable. Whether the presence in defendant's pocket of the gloves that he may have used in his work as a janitor, which he did not wear while committing his offense, tends to show pre-planning is at best dubious. Regarding the victim's flashlight as a weapon used in the commission of the burglary is also debatable. Nonetheless, the trial court could reasonably find that defendant wielded the flashlight as a weapon in an attempt to escape. Moreover, the burglary offense can be regarded as more serious than defendant's prior offense, which is properly considered as a factor in aggravation. Thus, we cannot say that the court abused its discretion in imposing the upper term.

Disposition

The judgment is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

_____
Jenkins, J.

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